EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Miss K O'Leary		**Click Travel Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 9 – 11 May 2022

EMPLOYMENT JUDGE GASKELL **MEMBERS: Ms L Wilkinson**
Mr RW White

Representation
For the Claimant: **Mr D Jennings (Lay Representative)**
For the Respondent: **Mr R Scuplak (Consultant)**

JUDGMENT
(Promulgated on 11 May 2022)

The unanimous Judgement of the tribunal is that:

1 The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaints of discrimination on the grounds of sex and/or pregnancy/maternity, pursuant to Section 120 of that Act, are dismissed.
2 The claimant was fairly dismissed by the respondent by reason of redundancy. The claimant's claim for unfair dismissal is not well-founded and is dismissed.
3 The claimant's claim for unpaid wages is not well-founded and is dismissed.

REASONS

1 An oral judgment was delivered to the parties on 11 May 2022, these written reasons are provided pursuant to a request from the claimant dated 18 May 2022 pursuant to Rule 62(3) of the Employment Tribunals Rules of Procedure 2013.

Introduction

2 The claimant in this case is Miss Kimberley O'Leary who was employed by the respondent, Click Travel Limited, from 12 December 2015 until 31 August

2020 when she was dismissed. The reason given by the respondent at the time of the claimant's dismissal was redundancy. Prior to commencing maternity leave on 4 May 2019, the claimant role was Senior MICE Administrator.

3 By a claim form presented to the tribunal on 30 December 2020, the claimant brings claims for unfair dismissal, sex discrimination, discrimination on the grounds of pregnancy and/or maternity and for unpaid wages.

4 All of the claims are denied. It is the respondent's case that the claimant was dismissed by reason of redundancy and that the dismissal was fair. The respondent denies any form of discrimination; and denies that any wages or other payments due to the claimant are outstanding.

The Evidence

5 As there was an unfair dismissal claim, the respondent presented its evidence first. The respondent relied on the evidence of four witnesses: Mr Ross Spencer – Head of Internal Communications; Mr Christopher Vince – Director of Operations; Ms Alisha Cohen – Head of People; and Mr James McLean – CEO.

6 The Claimant gave evidence on her own account she called no additional witnesses.

7 In addition, we were provided with an agreed hearing bundle running to some 181 pages. We have considered those documents from within the bundle to which we were referred by the parties during the course of the hearing.

8 We found the evidence of the respondent's witnesses to be clear, compelling and consistent. The evidence remained internally consistent during cross-examination; the evidence that was consistent with contemporaneous documentation; and the evidence given by witnesses was consistent with that given by other witnesses.

9 In two important respects we found the evidence of the claimant to be implausible because the evidence given was quite inconsistent with contemporaneous documents and with the claimant's actions at the relevant time.

10 The two elements of implausibility are:

(a) The claimant's assertion that it was never explained to her that the role of Senior MICE Administrator was not available on the basis of a two day working week.

(b) The claimant's assertion that, had she been aware that the role of Senior MICE Administrator was not available on a 2-day per week basis, she would have returned to work after maternity leave on a full-time basis.

Facts

11 The respondent operates a technological based business travel service via the Internet and telephone. Until August 2020, the business employed some 245 staff.

12 The claimant commenced her employment on 12 December 2015 and in the period from then until her dismissal in August 2020 she performed a number of roles in the MICE (Meetings, Incentives, Conferences &Entertainment) department.

13 In April 2019, the claimant was promoted to the role of Senior MICE Administrator - the promotion brought with it a commensurate increase in salary - the respondent employed only one Senior MICE Administrator. The respondent employed a number of MICE Consultants and Senior MICE Consultants.

14 In May 2019, the claimant commenced a period of maternity leave. We accept the evidence given by Mr Vince that during the claimant's maternity leave her role of Senior MICE Administrator was covered by a number of colleagues including Emma Baker (who was originally recruited as maternity cover for the claimant), Hannah Dodd, and Gemma Burton (who substantive roles were MICE Consultants).

15 On 4 January 2020, the claimant sent an email to her then line manager Ms Amanda Norrie in which she explained that post maternity leave she would be unable to return to full-time working hours but was hoping that she could be accommodated working part-time and from home (this email was not a formal flexible working request compliant with the provisions of Section 80F of the Employment Rights Act 1998 - ERA). In our judgement, this email was met with a highly constructive response from Ms Norrie and in a series of emails between 4 - 24 January 2020 it was established that the claimant wished to work from home on two days each week preferably on Wednesday and Thursday. The claimant had a scheduled keeping in touch day on 31 January 2020 and it was agreed that the proposal for part-time working from home would be discussed further then.

16 This brief notes of a meeting between the claimant and Ms Norrie on that day indicate that the claimant was advised that, for operational reasons, the respondent's view was that her substantive role of Senior MICE Administrator could not be satisfactorily performed on a two day per week basis. Instead, the

respondent proposed to create a new role for the claimant to accommodate her wish to work from home on two days per week. The new role was that of MICE Monitoring Analyst.

17 The upshot of the meeting was that a formal flexible working request (fully compliant with the provisions of Section 80F ERA) was then lodged. This request expressly encompassed the new role and the agreed two-day working week.

18 The claimant's case before us is that she did not complete the formal request, and indeed that she had not seen the document until she received the trial bundle. We have not heard evidence from Ms Norrie, but on the basis of the evidence we have heard it appears that the document was completed by Ms Norrie during the course of her discussion with the claimant on 31 January 2020 and we have no reason to doubt that it properly reflected what was discussed and agreed at that meeting. We have reached that conclusion because, on 10 February 2020, the respondent wrote to the claimant telling her that her flexible working request (in line with the formal request to which we have referred) had been approved and setting out her new and her new terms and conditions in line with the two day working week which the claimant had originally requested. If it was not the case that the formal request reflected what had been discussed and agreed between the claimant and Ms Norrie, then on any view the claimant would have queried this letter.

19 We do not accept that the claimant was backed into a corner or coerced into accepting the new role. What was of overwhelming importance to the claimant, was to secure a two day working week. We do not accept her evidence that had she been told that this would involve a change of role, she would have returned full-time.

20 The claimant was aware that she had the right to return to her previous full-time role; there is no basis to suggest that she was deterred from this in any way. She could have indicated a wish to return and we find that had she done so she would have been restored to her pre-maternity leave role. However, this was not what the claimant wanted - because she wanted a two day working week.

21 In our judgement, from 10 February 2020, there was an agreed variation of the claimant's contract of employment to reflect the new role, the new working hours, and the commensurate change of salary.

22 On 4 May 2020, the claimant returned to work from maternity leave and was immediately placed on furlough. During her period of furlough, she was paid her full salary entitlement pursuant to the February 2020 agreement.

23 It is unsurprising having regard to the nature of its business, that the respondent was severely and very suddenly impacted by the imposition of the lockdown on 20 March 2020. This was a time of considerable uncertainty for all businesses and by June 2020 the respondent had concluded that there was a need to significantly reduce its number of staff (initially a headcount reduction of 46 was envisaged). There followed a wide-ranging consultation including the election of staff representatives. Within the collective consultation such matters were agreed as the identification of those roles which were at risk of redundancy, the pooling of at risk employees for the purposes of selection, and the appropriate selection criteria. At one end of the scale the role of Senior MICE Administrator was not placed at risk, on the other hand the claimant's latest role was to be eliminated outright. So far as the claimant was concerned the respondent's decision was to place her in the pool of Senior MICE Consultants this being the employee group with whom she most closely shared appropriate skills and experience. When given the opportunity of individual consultation, the claimant raised no objection to this pooling suggestion.

24 Employees in each pool were selected by reference to 5 criteria:

Performance
Attendance
Timekeeping
Disciplinary record
Internal quality/compliance

25 Performance was assessed by reference to an employee's appraisals during the previous two years. For most employees, this would mean that three appraisals were considered. In the claimant's case, because of her absence on maternity leave, only one appraisal came into consideration. All of the appraisals were anonymized when they were considered and scored by Mr Spencer.

26 The claimant was unsuccessful in the selection process. She was selected for dismissal by reason of redundancy and dismissed on 30 August 2020. Mr Vance took charge of the process and was the dismissing officer.

27 The claimant was given a right of appeal. Her appeal was considered by Mr Mclean but was not upheld.

The Law

28 **The Equality Act 2010 (EqA)**

Section 4: The protected characteristics

The following characteristics are protected characteristics—
age
disability
gender reassignment
marriage and civil partnership
pregnancy and maternity
race
religion or belief
sex
sexual orientation

Section 13: Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Section 18: Pregnancy and Maternity Discrimination: Work Cases

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—

(a) because of the pregnancy, or
(b) because of illness suffered by her as a result of it.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or
(b) it is for a reason mentioned in subsection (3) or (4).

Section 123: Time limits

(1) Proceedings on a complaint within Section 120 may not be brought after the end of—

(*a*) the period of 3 months starting with the date of the act to which the complaint relates, or
(*b*) such other period as the employment tribunal thinks just and equitable.

Section 136: Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

29 **Maternity and Parental Leave Etc Regulations 1999 (MPLR)**

Regulation 10: Redundancy during maternity leave

(1) This regulation applies where, during an employee's ordinary or additional maternity leave period, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment.

(2) Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer or his successor, or an associated employer, under a new contract of employment which complies with paragraph (3) (and takes effect immediately on the ending of her employment under the previous contract).

(3) The new contract of employment must be such that—

(a) the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and
(b) its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than if she had continued to be employed under the previous contract.

Regulation 18: Right to return after maternity or parental leave

(1) An employee who returns to work after a period of ordinary maternity leave, or a period of parental leave of four weeks or less, which was—

(a) an isolated period of leave, or
(b) the last of two or more consecutive periods of statutory leave which did not include—

(i) any period of parental leave of more than four weeks; or
(ii) any period of statutory leave which when added to any other period of statutory leave (excluding parental leave) taken in relation to the same child means that the total amount of statutory leave taken in relation to that child totals more than 26 weeks,

is entitled to return to the job in which she was employed before her absence.

(2) An employee who returns to work after—

(a) a period of additional maternity leave, or a period of parental leave of more than four weeks, whether or not preceded by another period of statutory leave, or
(b) a period of ordinary maternity leave, or a period of parental leave of four weeks or less, not falling within the description in paragraph (1)(a) or (b) above, is entitled to return from leave to the job in which she was employed before her absence or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances.

(3) The reference in paragraphs (1) and (2) to the job in which an employee was employed before her absence is a reference to the job in which she was employed—

(a) if her return is from an isolated period of statutory leave, immediately before that period began;
(b) if her return is from consecutive periods of statutory leave, immediately before the first such period.

(4) This regulation does not apply where regulation 10 applies.

Regulation 20: Unfair dismissal

(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if—

(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3),

(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with—

(a) the pregnancy of the employee;
(b) the fact that the employee has given birth to a child;
(d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave;

30 **Employment Rights Act 1996 (ERA)**

Section 80F: Statutory right to request contract variation

(1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if—

(a) the change relates to—

(i) the hours he is required to work,
(ii) the times when he is required to work,
(iii) where, as between his home and a place of business of his employer, he is required to work, or
(iv) such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations, …

(2) An application under this section must—

(a) state that it is such an application,
(b) specify the change applied for and the date on which it is proposed the change should become effective, [and]
(c) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with, …

Section 80G: Employer's duties in relation to application under section 80F

(1) An employer to whom an application under section 80F is made—

(a) shall deal with the application in a reasonable manner,

(aa) shall notify the employee of the decision on the application within the decision period, and

(b) shall only refuse the application because he considers that one or more of the following grounds applies—

(i) the burden of additional costs,
(ii) detrimental effect on ability to meet customer demand,
(iii) inability to re-organise work among existing staff,
(iv) inability to recruit additional staff,
(v) detrimental impact on quality,
(vi) detrimental impact on performance,
(vii) insufficiency of work during the periods the employee proposes to work,
(viii) planned structural changes, and
(ix) such other grounds as the Secretary of State may specify by regulations.

Section 80H: Complaints to employment tribunals

(1) An employee who makes an application under section 80F may present a complaint to an employment tribunal—

(a) that his employer has failed in relation to the application to comply with section 80G(1), …
(b) that a decision by his employer to reject the application was based on incorrect facts, or
(c) that the employer's notification under section 80G(1D) was given in circumstances that did not satisfy one of the requirements in section 80G(1D)(a) and (b).

Section 94: The right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98: General Fairness

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer

acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

Section 139: Redundancy

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

31 **Decided Cases: Pregnancy/Maternity Discrimination**

R (on the application of E) -v- Governing Body of JFS **[2009] UKSC 15 (SC)**

The “but for” test should not be used to determine whether discrimination has been proved, unless the factual criteria applied by the respondent are inherently discriminatory.

Interserve Limited -v- Tuleikyte **[2017] IRLR 615 (EAT)**

When considering allegations of unfavourable treatment because of absence on maternity leave under Section 18(4) EqA, the correct legal test is the “reasons why” approach; it is not a “criterion” test.

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Shamoon -v- Chief Constable of the RUC **[2003] IRLR 285 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**

Employment tribunals can usefully commence their enquiry by asking why the claimant was treated in a particular way: was it for a prescribed reason? Or was it for some other reason?
If a protected characteristic or protected acts had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence.

Amnesty International -v- Ahmed **[2009] IRLR 884 (EAT)**

The fact that [a protected characteristic] is part of the circumstances in which the treatment complained of occurred, or the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.

Johal -v- Commission for Equality and Human Rights **[2010] All ER (D) 23 (Sep) (EAT)**

Where an employee on maternity leave was deprived of the opportunity to apply for promotion due to an administrative error, it was the administrative error and not the fact of the maternity leave which was the reason for the treatment. Maternity leave was the occasion for the treatment complained of; it was not the reason for the treatment.

Ladele –v- London Borough of Islington **[2010] IRLR 211 (CA)**

There can be no question of direct discrimination where everyone is treated the same.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis, it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

The Law Society -v- Bahl **[2003] IRLR 640**

A tribunal is not entitled to draw an inference of discrimination from the mere fact that an employer has treated an employee unreasonably. It is a wholly unacceptable leap to conclude that whenever the victim of unreasonable conduct has a protected characteristic then it is legitimate to infer that the unreasonable treatment was because of it. All unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory. To establish unlawful discrimination, it is necessary to show that the employer's reason for acting was one of the proscribed grounds. Discrimination may be inferred if there is no explanation for the unreasonable behaviour, it is not then the mere fact of unreasonable behaviour which entitles the tribunal to infer discrimination, but rather the fact that there is no reason advanced for it.

32 **Decided Cases: MPLR**

The Secretary of State for Justice -v- Slee **UKEAT/0349/06/JOJ**

The question of whether it is not practicable to continue to employ a woman under her existing contract of employment "*by reason of redundancy*", is to be answered by reference to the standard definition of redundancy in Section 139 ERA. It was held that Regulation 10 was engaged even though, under the employee's contract, the employer was entitled to move her to an alternative role which it intended to do. The redundancy situation did not therefore bring an end to the contract, but she was nevertheless redundant for the purposes of the Regulation.

Sefton Borough Council -v- Wainwright **[2015] IRLR 90 (EAT)**

The respondent decided to abolish two roles including that of the claimant who was on maternity leave and replace them with one new job. The claimant was not offered the new job and succeeded in a claim of automatically unfair dismissal on

the basis that the new role was a suitable vacancy. On appeal to the EAT, the respondent argued that Regulation 10 was not engaged until the decision had been taken as to who was the best candidate for the new role - in effect, the claimant was not “redundant” until the respondent had determined who would be slotted into that role and only at that point would the respondent become obliged to offer a suitable vacancy. It was held that this interpretation would undermine the protection offered by Regulation 10. Applying the Section 139 ERA definition, the tribunal was entitled to conclude that the claimant was redundant when the respondent decided that two positions would be replaced by one.
Unfavourable treatment of a claimant whilst on maternity leave does not of itself amount to unfavourable treatment “because of” pregnancy or maternity leave as Section 18 EqA requires.

Simpson -v- Endsleigh Insurance Services Limited **[2011] ICR 75 (EAT)**

Regulation 10(3)(a) and (b) must be read together in determining whether an available vacancy is “*suitable*”. It is for the employer to decide whether a vacancy is suitable knowing what it does about the employee in terms of the employees work experience and personal circumstances. If a suitable vacancy exists, the employer must offer it. There is no obligation on the employee to engage with the process. The EAT expressed doubt as to whether an employer would choose to test suitability by assessment and interview.

33 **Decided Cases: Redundancy**

Taymech Limited –v- Ryan **EAT 633/94**
Thomas and Betts Limited –v- Harding **[1980] IRLR 255 (CA)**
Hendy Banks City Print Limited –v- Fairbrother **EAT 0691/04**

In carrying out a redundancy exercise, an employer should begin by identifying the group of employees from whom those who are to be made redundant will be drawn. In assessing the fairness of a dismissal, a tribunal must look to the pool from which the selection was made since the application of otherwise fair selection criteria to the wrong group of employees is likely to result in an unfair dismissal. If an employer simply dismisses an employee without first considering the question of a pool the dismissal is likely to be unfair. Employers have a good deal of flexibility in defining the pool from which they will select employees for dismissal. They need only show that they have applied their minds to the problem and acted from genuine motives. However, tribunals must be satisfied that an employer acted reasonably. A tribunal will judge the employer's choice of pool by asking itself whether it fell within the range of reasonable responses available to an employer in the circumstances.

Williams and Others –v- Compair Maxam Limited **[1982] IRLR 83 (EAT)**
Polkey –v- AE Dayton Services Limited **[1987] IRLR 503 (HL)**
R –v- British Coal Corporation and anr ex parte Price **[1994] IRLR 72**
King and Others –v- Eaton Limited **[1996] IRLR 199 (CS)**
Graham –v- ABF Limited **[1986] IRLR 90 (EAT)**
Rolls-Royce Motor Cars Limited –v- Price **[1993] IRLR 203 (EAT)**

In a case of redundancy in the employer will not normally act reasonably, unless he warns and consults any employees affected, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment.
The employment tribunal must be satisfied that it was reasonable to dismiss the individual claimants on grounds of redundancy. It is not enough to show that it was reasonable for the employer to dismiss *an* employee. It is still necessary to consider the means whereby the claimant was selected to be the employee to be dismissed.
Fair consultation means (a) consultation when the proposal is still at a formative stage, (b) adequate information on which to respond, (c) adequate time in which to respond, (d) conscientious consideration by the employer of any response.
If vague and subjective criteria are adopted for the redundancy selection there is a powerful need for the employee to be given an opportunity of personal consultation before he is judged by it.

34 **Decided Cases – General test of fairness**

Iceland Frozen Foods Limited –v- Jones **[1982] IRLR 439 (EAT)**
Sainsbury's Supermarkets Ltd. –v- Hitt **[2003] IRLR 23 (CA)**

In applying the provisions of Section 98 (4) ERA the employment tribunal must consider the reasonableness of the employer's conduct, and not whether the tribunal considers the dismissal to be fair. In judging the reasonableness of the employer's conduct an employment tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In many cases there is a band of reasonable responses to a given situation within which one employer might reasonably take one view, another quite reasonably take another. The function of the employment tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, then the dismissal is fair. If the dismissal falls outside the band it is unfair.
The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee is fairly and reasonably dismissed.

35 We have considered a number of iterations of Regulations and Directives made in respect of the Coronavirus Job Retention Scheme (Furlough).

The Claimant's Case

Discrimination

36 Although not easy to understand, the claimant's case on discrimination appears to be that she was unfavourably treated due to pregnancy/maternity in that she did not return to her former role of Senior MICE Administrator. That role was never placed at risk of redundancy. Had she returned to that role she would not have been in a pool for selection for redundancy. The claimant's case is that, had she been told that she could not return to the role of Senior MICE Administrator on a part-time basis, then, rather than return in a different role, she would have returned full-time.

37 The claimant further claims that she was treated unfavourably during the selection process: firstly, because she was incorrectly pooled; and then because of the application of the selection criteria in particular the fact that she had only one appraisal available for consideration.

Indirect Discrimination

38 Although a claim for indirect discrimination was intimated in the claimant's claim form, no such claim has been pursued before us.

Flexible Working Request

39 There is no pleaded claim for a remedy for failure to comply with the claimant's flexible working request. However, in the claimant's schedule of loss she indicates that she seeks a remedy for this. Her cases that her email of 4 January 2020 was a request for flexible working to which she did not receive a written response.

Unfair Dismissal

40 It is the claimant's case that she was unfairly selected for redundancy even if potential discrimination is disregarded. Again she relies upon the pooling and the performance criteria. She also maintains that having had a poor appraisal (before her commenced), she had not been given appropriate training to improve the performance.

Unpaid Wages

41 It is the claimant's case that, during her furlough period (4 May 2020 – 31 August 2020), she was entitled to be paid at the rate she would have earned in her full-time pre-maternity leave role as a Senior MICE Administrator. She relies on Government Regulations and Directives which set a reference date of 19 March 2020 for the calculation of furloughed employee's wages. The claimant's case is that as she had not returned to work in her part-time role on 19 March 2020, once furloughed on 4 May 2020, she was entitled to be paid at her previous full-time rate.

The Respondent's Case

Discrimination

42 The respondent denies any form of discrimination or unfavourable treatment of the claimant arising from her pregnancy or maternity leave. The respondent agrees that the claimant was entitled to return to work in the same role as before maternity leave and acknowledges that, had she done so, she would not have faced redundancy. But the only reason that the claimant did not return in that role was because the claimant did not wish to do so. The claimant wished to reduce her hours and working days to 2 days per week and the respondent dealt with that request in a very positive way even to the extent of creating a new role for her.

43 The claimant was not treated unfavourably in either the pooling or the application of the selection criteria. By the time the redundancy process commenced, the claimant was in a role which was simply to be eliminated. Arguably, the respondent could simply have selected her for redundancy without any selection process as that role was unique. But the respondent conscientiously considered which pool the claimant should be in. And when this was discussed with the claimant at the commencement of consultation, she did not demur from it. The claimant only sought to change the pooling when she was unsuccessful.

44 There is no reason to suggest that having just one appraisal considered in the performance criterion was unfavourable or disadvantageous. If the claimant had had a particularly good appraisal on that occasion it would have worked to her advantage. Again, this was discussed with the claimant during consultation and she did not object until she had been selected for redundancy.

Flexible Working Request

45 The respondent points out that there is no claim in the claimant's pleaded case for breach of Section 80G ERA. But in any event the email of 4 January 2020 did not comply with the requirements of Section 80F. And so there can be no viable claim against the respondent for failing to deal with it in accordance with Section 80G. The respondent's cases that the claimant made a compliant request following her meeting with Ms Norrie on 25 January 2020. That request was agreed in full and new terms and conditions were agreed.

Unfair Dismissal

46 The respondent's case is that the sole reason for the claimant's dismissal was redundancy. There was extensive period of both individual and collective consultation. The respondent gave conscientious thought to the question of pooling and its decision was to the claimant's advantage. The respondent gave conscientious thought to the selection criteria and how they would be assessed. All of this was discussed with the claimant at the outset of consultation and she did not disagree with any aspect of it. The claimant was therefore selected following a fair process and the dismissal was fair.

Unpaid Wages

47 The respondent points out that none of the Regulations or Directives upon which the claimant relies operated to change the terms and conditions of any employee's contract. It is for that reason that an employee needed to consent to a contract variation when placed on furlough. The Regulations and Directives including the reference point of 19 March 2020 were intended to regulate the amount that an employer could claim from the government by way of furlough grant. The employer could only claim if the employee was not doing any work for the employer, and could claim at a maximum of 80% of the employee's normal wages subject to a maximum of £2500. The reference date was included to prevent fraud: for example by an employer giving an employee and increase in salary just before furlough thus enabling and inflated claim to be made.

48 The respondent's case is that, by the time the claimant was placed on furlough, her contractual terms and conditions were in accordance with the part-time position agreed in February 2020 (before the reference date in any event). It is nonsensical to suggest that if the claimant had returned to work in May 2020 and had been working and had not been placed on furlough, she would have been paid for the part-time hours. But because she was placed on furlough, she was suddenly thereby entitled to receive her full-time hours.

49 The respondent's case therefore is that, during furlough the claimant received her full contractual pay and there is no viable claim for unlawful deductions or underpayment. The claimant was paid 100% of contractual pay during furlough: the respondent did not simply pay 80%.

Discussion/Conclusions

Direct Discrimination

50 We fail to see any basis upon which we could conclude that the claimant was treated less favourably or unfavourably by reason of her sex or by reason of her pregnancy/maternity. Of course the claimant was entitled to return to her previous role, the claimant was well aware of this. We are quite satisfied that she would have returned to that role had she not requested a change in terms and conditions. When that request was made, the respondent responded in a commendably positive way, and following a discussion about what might suit the claimant's request, made an effective change to her terms and conditions in February 2020 even to the extent of creating a new role for the claimant.

51 We reject the claimant's suggestion that she was not told that her pre-maternity role could not be done on a part-time basis. It is clear that this is precisely what she was told in her conversation with Ms Norrie on 25 January 2020. We further reject the claimant's suggestion that, if she had been told, then she would have returned to her existing role on a full-time basis. The only reason that new working terms and conditions were under discussion was because the claimant had made clear that she could not return on a full-time basis. The claimant accepted the new role because it suited her personal circumstances. But when later events put her at a disadvantage, she seeks to suggest that this new role was somehow forced upon her. The new role clearly was not forced upon her: if it was not what she wanted and had agreed, she would have queried the position when Ms Lauren Seward wrote to her with new terms and conditions and a new role on 10 February 2020.

Indirect Discrimination

52 As stated earlier, no claim for indirect discrimination was pursued before us.

Flexible Working Request

53 Although there is no pleaded case before us for a breach of Section 80G ERA, we can conveniently deal with the matter anyhow. The claimant's email of 4 January 2020 did not comply with the requirements of Section 80F. This is something which the claimant acknowledged when she gave evidence and the

particular requirements will put to her. Accordingly, the claimant has no viable case against the respondent for its alleged failure to respond in writing to that request as would be required under the provisions of Section 80G.

54 Following the claimant's meeting with Ms Norrie on 25 January 2020, a fully compliant request was submitted. The claimant suggests that she knew nothing of this, but we find this explanation quite incredible because, on 10 February 2020, she received a highly specific response setting out a new role, new hours, new terms and conditions, and an adjusted salary. The claimant did not query that: but simply signed the relevant paperwork to agree.

55 Accordingly, we find that, on 25 January 2020, the claimant's request for part-time hours was discussed and it was explained to her that, in order to accommodate this, the respondent would need to ask her to change her role - and indeed that the respondent had created a role for to facilitate this. That conversation led to the submission of the compliant Section 80F request, and the respondent dealt with it entirely in accordance with the requirements of Section 80G.

56 In the light of our findings set out above we find that the claimant was not discriminated against in any way unfair discrimination claims are dismissed.

Unfair Dismissal

57 We are satisfied that the sole reason for the claimant's dismissal was redundancy which is a potentially fair reason pursuant to Section 98(1) and (2) ERA.

58 We are further satisfied that the respondent conducted an open and thorough consultation process, discussing its intentions with the claimant in advance at every stage. Consultation took place collectively amongst the workforce and on an individual basis.

59 So far as pooling is concerned, this really is a matter for the respondent and the respondent has a very wide discretion in how to construct pools for selection. By the time that redundancy was under consideration, the claimant was in her new role which was a unique role and was to be eliminated as part of the redundancy process. The respondent recognised that it would be extremely harsh on the claimant if she were left in a pool of one with dismissal inevitable. The respondent therefore placed the claimant in a wider pool of what it regarded as comparable employees. When the pooling was discussed with the claimant, she did not object. She has only objected to the pooling once she was unsuccessful in the selection process - suggesting an alternative pool where she now believes she may have had a better chance of success. Or even suggesting

that she should have been reverted to her pre-maternity full-time role which was not at risk of redundancy.

60 There is no basis for either criticism: the respondent conducted itself in a transparent and fair way on this aspect of the process.

61 As to the selection criteria, again these were agreed in advance with the claimant. The performance criteria relying on just one appraisal in her case was not unfair and could well have been to her advantage.

62 If the claimant had been dismissed for poor performance, then the failure to provide training would have been an important consideration. But she was not. Her alleged poor performance was not so poor as to place her at risk of a capability dismissal. But in the comparative exercise of a selection process, it worked to her disadvantage. In our judgement there was no unfairness in this.

63 Once selected, the claimant was given a right of appeal. We are satisfied that Mr McLean conscientiously and independently considered the appeal but he was satisfied that the right decision had been made.

64 In these circumstances, we find that the claimant was fairly dismissed.

Unpaid Wages

65 We agree with Mr Scuplak's submissions the Regulations and Directives surrounding the Furlough scheme regulated arrangements between employers and the government. They did not affect contractual rights between employers and employees. The reference date of 20 March 2020 referred to in the guidance relied upon by the claimant regulates how much an employer could claim towards the salary of a retained employee. What the employee was entitled to was not less than 80% of contractual salary, in this case the claimant was paid 100%.

66 We entirely agree that it would produce a nonsensical result if the claimant's submissions were correct. It would mean that had she returned to work in May 2020 without furlough she would have been paid in accordance with the terms and conditions agreed in February 2020, but the claimant's nonsensical position is that because she was placed on furlough she was entitled to a windfall and to receive remuneration in accordance with her previous terms and conditions including full-time work.

67 We find that there are no unpaid wages and no unlawful deductions. That claim is accordingly dismissed.

68 Accordingly and for the reasons given, the claimant's claims are dismissed in their entirety.

Employment Judge Gaskell
2 August 2022